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In the
Supreme Court of the United States

OCTOBER TERM, 1985

GLENDA MERWINE

Petitioner

VERSUS

BOARD OF TRUSTEES FOR STATE INSTITUTIONS OF HIGHER LEARNING, ET AL,

Respondant

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

NUMBER 84-4036

Decided March 8, 1985

Reported in 754 F2d 631

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OF
THE UNITED STATES

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BOARD OF TRUSTEES FOR STATE INSTITUTION
OF HIGHER LEARNING, ET AL

Respondent

QUESTION PRESENTED FOR REVIEW

I.

Was the Fifth Circuit Court of Appeals correct in applying a clearly erroneous standard of review to an implied finding of fact, but refusing to review the legal correctness of the underlying opinion from which the implication was drawn?

II.

Does the challenged requirement in this Title VII case, the American Library Association Accredited Master of Library of Science Degree, bear a manifest relationship to the employment in question as claimed by the Defendants, and is it a business necessity?

III.

Did the plaintiff make out a *prima facie* case of disparate impact under Title VII of the Civil Rights Act of 1964?

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GLENDA MERWINE,

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VERSUS

BOARD OF TRUSTEES FOR STATE INSTITUTIONS OF HIGHER LEARNING, ET AL

Respondent[1]

OPINIONS REPORTED

The United States District Court for the Northern District of Mississippi, Magistrate Charles M. Powers, presiding, rendered its memorandum decision in this cause on the 29th day of December, 1983. A complete copy of the memorandum decision is included in the appendix to this brief.

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[1] Glenda Merwine, Plaintiff-Appellant, brought suit in the United States District Court for the Northern District of Mississippi against Mississippi State Univeristy and the Board of Trustees for State Institutions of Higher Learning and individual defendants James D. McComas, President of Mississippi State University; George Lewis, Library Director of Mississipi State University; and James G. Miller, Dean of the College of Veterinary Medicine at Mississippi State University. All individual defendants were dismissed by the Trial Magistrate and Plaintiff does not challenge their dismissal in this Petition.

Plaintiff believes the disparate impact portion of this case, i.e., whether requiring the American Library Association accredited Master of Library Science degree as a minimum employment qualification unlawfully discriminated against her on the basis of her sex, is of extreme importance to the library profession and universities, nationwide. The American Library Association apparently feels similarly because it made an appearance before the Fifth Circuit Court of Appeals through its attorneys, James S. Whitehead and Mary Hutchings Reed.

The United States Circuit Court of Appeals for the Fifth Circuit rendered its opinion on March 8, 1985 styled *Glenda Merwine, Plaintiff-Appellant versus Board of Trustees for State Institutions of Higher Learning, et al, Defendants-Appellees,* 754 F2nd 631 (1985).

JURISDICTIONAL GROUNDS

Review is sought of the opinion from the United States Circuit Court of Appeals for the Fifth Circuit rendered in this case on March 8, 1985. No petition for rehearing has been filed with that Court and petition for Writ of Certiorari is brought directly to the United States Supreme Court under the authority of Title 28 USCA Section 2101(c).

STATUTES INVOLVED IN THE CASE

Civil Rights Act of 1964, Section 701 et seq., 42 USCA Section 2000e-2 (a)

(a) It shall be an unlawful employment practice for an employer

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privilages of employment, because of such individual's race, color, religion, sex or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversly affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Plaintiff petitions for review of the findings of the Fifth Circuit Court of Appeals as they relate to her claim that a facially neutral requirement, the American Library Association Accredited Master of Library Science Degree, unlawfully deprived her of an employment opportunity with the defendant, Mississippi State University.

STATEMENT OF THE CASE[2]

Plaintiff, Glenda Merwine, a Librarian, accompanied her husband to the State of Mississippi where he enrolled in the College of Veterinary Medicine at Mississippi State University. Prior to moving to Mississippi, Mrs. Merwine had achieved nine hours toward an ALA Accredited Master of Library Science at Fresno State University in the State of California. There being no American Library

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[2] Plaintiff chooses not to petition for review of the findings of the Court of Appeals on the question of disparate treatment. Plaintiffs disparate impact claim, i.e. , whether the requirement of an ALA-MLS degree as a minimum qualification for employment unlawfully discriminated against Plaintiff because of her sex, speaks to basic American precepts of fair play that are protected by Title VII, the spirit of the U.S. Constitution and court precedents. The precept, for example, that a person should be considered based on her knowledge, skills and abilities, not on how she acquired them and the precept that if an employer chooses to place more importance on how skills are acquired, rather than on what skills are possessed, then that employer should be prepared to expound a *substantive* reason for doing so. Plaintiff possessed the knowledge, skills and abilities for the position for which she applied. She was rejected because she did not obtain these skills at a library school accredited by the American Library Association. Female librarians frequently find themselves in similar circumstances as Plaintiff. Male librarians infrequently find themselves in similar circumstances. The final question before the Court is, "is it necessary to discriminate against a woman in this manner?"

Association Accredited Master of Library Science Degree (ALA-MLS) offered within the confines of the State of Mississippi, Mrs. Merwine continued her education by obtaining the available alternative, a Masters Degree in secondary education with specialty in Library Science from Mississippi State University. This degree was equivalent in all respects to the American Library Association Accredited Master of Library Science Degree, but was not accredited by the American Library Association.

Plaintiff sought in May of 1980 an appointment as Librarian for the College of Veterinary Medicine at Mississippi State University. Plaintiff completed her masters program in August of 1980 at about the same time the successful male applicant was hired. Candidates in the process of obtaining the challenged qualification, the ALA-MSL, were considered.

Having been rejected in favor of a male applicant whom she deemed to be lesser qualified than herself, Plaintiff brought suit alleging, *inter alia* that a facially neutral requirement, the American Library Association Accredited Master of Library Science Degree (hereinafter referred to as ALA-MLS) which was used as justification for her non-selection, had an adverse impact on women applicants for the position and bore no manifest relationship to the employment in question. Plaintiff's case rested on stipulated statistical data establishing that prior to implementation of the requirement in 1978, eighty nine percent (89%) of male applicants for professional librarian positions at Mississippi State University possessed an ALA Accredited Master of Library Science Degree while on fifty four percent (54% of female applicants for those same professional librarian positions possessed the ALA-

MLS, and that for the particular job being sought, one hundred percent (100%) of the male applicants had the ALS-MLS while only sixty-nine percent (69%) of the females had it.

The United States District Court for the Northern District of Mississippi, Magistrate Charles M. Powers presiding, ruled that the Plaintiff had not made a **prima facie** case of disparate impact.[3] No ruling whatever was made by the Magistrate with regard to the question of business necessity. Plaintiff appealed to the United States Circuit Court of Appeals for the Fifth Circuit contending that the Magistrate erred by (a) restricting the applicant pool to only those librarians possessing the challenged requirement, the ALA-MLS, and (b) by segmenting the statistical data so as to fashion an inappropriate result and (c) by not applying the holding of the U.S. Supreme Court in *Connecticut v. Teal* 457 U.S. 440, 102 S.Ct. 2525, 73 L. Ed 2nd 130 (1982) that and individual may object that an employment qualification used in making hiring decisions has a discriminatory impact even if the class in which she is a member has not been disproportionally denied employement.

In its opinion rendered March 8, 1985, the Court of Appeals for the Fifth Circuit refused to consider the Plaintiffs attack on the Magistrates finding that she had not made out a *prima facie* case, declining to state whether the Plaintiff or the Magistrate was correct on this point.

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[3] The Magistrate concluded...

The Court accordingly concludes that Plaintiff has failed to establish a *prima facie* case of discrimination in hiring on the basis of sex in violation of Title VII because of utilization of the ALA-MLS requirement by MSU for the position of Branch Librarian at the College of Veterinary Medicine in 1980. See Appendix.

The Court of Appeals did, however, go on to infer that the Magistrate had implied in his Opinion that the ALA-MLS degree was a business necessity. In fact, no such implication was made by the Magistrate, for he never reached the issue of business necessity. Treating this inference as being tantamount to a finding of fact by the District Court, the U.S. Court of Appeals for the Fifth Circuit then applied a clearly erroneous standard of review to the implied find of fact that the ALA-MLS degree was a business necessity.

At the trial, both sides presented extensive expert testimony. The Plaintiff presented Glen Zimmerman, Associate Librarian for Management, the Library of Congress, who testified

> ...it is my professional opinion that the ALA accredited degree is not a valid minimum educational qualification. And I base that opinion, basically, on the same reasoning process that the library of Congress had to use. And that is, going back to the purpose of a minimum qualification, if it is valid, it is supposed to be a predictor of success in a postion.
>
> If the position in question were posted with the ALA-MLS degree, then that in effect is stating that nobody without that degree can perform that work. And if they actually have staff members on their staff, in the library, doing that work and doing it satisfactorily, then the issues are at odds. [T-371].

Plaintiff also presented the late Stephen Bemis[4] who testified

> ...having conducted four to five hundred validation studies on a wide range of occupations, I do not see how that requirement could be valid.
>
> Perhaps I might explain a little bit. The number of stipulations that have been made indicate that there appear not to be differences in performance of people on the job favoring those with the degree requirement. And in fact, perhaps there are differences in the other direction.
>
> But the essence of a statistical validation would be to show that those people who have the degree requirements are better performers on the job. And as I understand the stipulations, it is just the opposite that has been stipulated.[T-232]

This case has generated considerable discussion in the community of librarians, nationwide. The impact of the opinion of the Fifth Circuit Court of Appeals will be immense to those librarians who, like the plaintiff, are competent, but do not possess that all important seal of approval by the American Library Association.

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[4] Mr. Steven Bemis, at the time of his testimony, was Vice-President of Psychological Service, Inc. He testified that his firm specialized in assessment of people in the area of tests, background statements, performance appraisal, and also statistical aspects of validation [T-211]. Mr. Bemis testified that he authored the four fifths rule of thumb when he was employed by the office of Federal Contract Compliance. The four fifths rule of thumb is currently employed by the Uniform Guidelines on Employee Selection Procedures as a quantitative measure of adverse impact.

BASIS FOR FEDERAL JURISDICTION

Jurisdiction was conferred on the U.S. District Court of the Northern District of Mississippi and the U.S. Court of Appeals for the Fifth Circuit by virtue of the U.S. Constitution, Amendment Fourteen, 28 U.S.C.A. 1343 and 28 U.S.C.A.1331 and 42 U.S.C.A. 1983 and by virtue of Title VII of the Civil Rights of 1964, 42 U.S.C.A. 2000(e), et seq. This Petition is limited to issues arising under the Civil Rights Act of 1964, 42 U.S.C.A. 2000e-2(a), et seq., as it pertains to Plaintiffs claim that a facially neutral standard, the ALA-MLS, unlawfully deprived her of an employment opportunity with the Defendant, Mississippi State University.

ARGUMENT

I. *BURDEN OF PROOF*

The trial magistrate held only that Plaintiff had not shown a *prima facie* case of disparate impact. That was the extent of the trial courts holding on disparate impact. Plaintiff disputed the legal correctness of the trial courts interpretation of the facts and filed her appeal explaining at length, why there was in fact a statistical case of disparate impact. The Fifth Circuit Court of Appeal refused to consider whether plaintiff had or had not made out a *prima facie* case, moving directly to the issue of business necessity. It declined to address the issues raised by both parties concerning the relevant statistical labor pool to be addressed.[5]

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[5] Plaintiff had contended that the relevant labor pool included all librarians with the knowledge, skills and ability to perform the job in question. Defendants contended that the relevant labor pool consisted

At this point, however, the Fifth Circuit Court of Appeals radically departed from the accepted burden of proof established by the United States Supreme Court. For, instead of requiring the Defendants to prove that the ALA-MLS degree was a business necessity, they inferred that the trial court had so found and then required the Plaintiff to attack that finding is clearly erroneous.

The Fifth Circuit Court of Appeals, itself, has repeatedly ruled that the clearly erroneous standard of review does not apply to findings of fact premised on an erroneous view of controlling legal principles. *Johnsons v. Uncle Ben's, Inc.*, 628 F2nd 419 (5th Cir., 1980); *Parson v. Kaiser Aluminum and Chemical Corp.* 575 F2nd 1374, 1382 (5th Cir. 1978); *Johnson v. Goodyear Tire and Rubber Co.*, 491 F2nd 1364, 1372 n. 20 (5th Cir., 1974).

Yet, in this case at hand, the Fifth Circuit applied a clearly erroneous standard of review, but refused to even rule whether the finding of no *prima facie* case, from which its inference was taken[6], was premised on an erroneous view of controlling legal principles as claimed by Plaintiff. What is the difference between applying a clearly erroneous standard to an erroneous view of controlling legal

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(footnote 5 continued)
only of those applicants who already possessed an ALA-MLS degree. In footnote 8 of the opinion of the Fifth Circuit court of Appeals, the Court stated..."We decline to address the issues raised by both parties concerning the relevant statistical labor pool to be addressed". 754 F2d page 639, Note 8.

[6] The Appeals Court stated, "...the magistrate's holding that Merwine failed to establish her disparate impact claim *impliedly included* the finding that the ALA-MLS degree had a manifest relationship to the employment in question at issue here. (footnote omitted) We decline to hold that this finding was clearly erroneous..." 754 F2nd, page 639.

principles, on the one hand, and applying it to an implied finding of fact after refusing to rule, on the other hand, whether the underlying finding of fact from which that implication was drawn, was based on a correct view of controlling legal principles. There is no difference. The obvious conclusion is that the Fifth Circuit has *violated its own proscription* against improper use of the clearly erroneous standard of review.

The net effect of this device is that a Plaintiff now has the burden of showing both a *prima facie* case and also an additional burden of showing that the challenged requirment does not have a manifest relationship to the employment in question. Plaintiff is at a loss to understand why she was singled out for a heavier burden of proof on her disparate impact case than other plaintiffs have.

That the Court of Appeals required the Plaintiff to meet the improper burden of showing no business necessity is obvious from reading of the opinion. Although it was stipulated that "non ALA-MLS degree holders at Mitchell Memorial Library of Mississippi State University performed equally well as ALA-MLS degree holders at Mitchell Memorial Library,"[7] the court of appeals took the position that because Plaintiff did not show that *at entry level*, non ALA-MLS degree holders would perform equally as well, she had not met her burden of proof. The Court of Appeals disregarded the much more relevant question of whether Defendants had ever shown that ALA-MLS degree holders perform any better than anyone else *at any level.*

Nextly, the Circuit Court alludes to evidence in the record that

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[7] Pre-trial order, Stipulation No. 41.

> ...an accreditation standard is particularly appropriate to insure not only that the appellant has received appropriate instruction and expertise but also that the institution from which the applicant graduated fulfills recognized, objective academic standards. 754 F2nd pages 639, 649.

The question is not whether ALA-MLS degree holders received appropriate instruction, but rather, whether there is any evidence that ALA-MLS degree holders receive instruction that was *more* appropriate than that received by other librarians. A rational examination of the evidence, without assumptions, indicates that they do not.

The Circuit Court then pegs their opinion on the fact that:

> ...Uncontested evidence indicates that approximately eighty percent (80%) of college and university libraries require that applicants for library faculty positions possess the ALA-MLS degree. 754 F2nd 640

Only eighty percent (80%)? What about the other twenty percent (20%) who apparently see no need to even advertise the requirement, much less require it. Does eighty percent make a manifest relationship? Ninety percent? One hundred percent? In Mississippi, in 1960, one hundred percent (100%) of public school districts insisted that there was a manifest relationship between skin color and educational opportunity.

Would a taxpayer have a defense against the C.I.R. if she proved that eighty percent of the other taxpayers were also underreporting their income?

II. *BUSINESS NECESSITY*

The experience at Mississippi State indicates that in fact, holders of the ALA-MLS degree may not perform as well as holders of other library degrees. There was uncontradicted testimony that those not possessing the ALA-MSL degree were promoted while some librarians with it were not.[8] This evidence certainly refutes the notion that the ALA-MLS degree is a business necessity. The Circuit Court dismisses the superior promotion record of non ALA-MLS Librarian by stating in the double negative:

> ...This testimony alone does not necessarily indicate that a business necessity does not exist for imposing the degree as a minimum educational requirement for entry level positions. 754 F2nd page 639, note 11.

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[8] Mrs. Alice Sanford, accepted as an expert on Mitchell Memorial Library at Mississippi State University by the Court, testified:

Well, I guess you would say that the best way to compare them is to see if they get promoted. That would be one rule of thumb. And, as I just pointed out, Mrs. Rice has been promoted to the third ranking position in the Library. Mrs. Downy and Mrs. Betts are both department heads. Well, and Mrs. Irby, she is a department head.

Now, there are many others over there with ALA degress who were there when these people were hired who have not been promoted. And some of the people, I know, were promoted instead of some of those people.

So, I think these people have performed. I think the degree has made no difference in their work, in their performance in the library. [T-166]

In other words, before the Plaintiff's case can be considered, she first has to show that the challenged requirement is not a business necessity. No precedent can be found for this approach in any United States Supreme Court opinion nor in any opinion of the various Circuit Courts of Appeal.[9]

Next, the Circuit Court of Appeals alludes to, "testimony that on average the ALA accredited MLS degree holder, as opposed to the non-accredited degree holder, exhibits a noted superiority in reliability and dependability to the hiring libarary." The Circuit Court ignores the stipulation that ALA-MLS degree holders don't perform any better, but they give great credence to the self serving testimony of the Defendants president that ALA-MLS degree holders are somehow "just better", without saying why. This approach was tried by the company vice-president in the case of *Griggs v. Duke Power Company* and given no credence by the United States Supreme Court. Under the Circuit court rationale, there has been a new defense created, the "just better" defense.

Lastly, the ALA-MLS degree is defended by the Court of Appeals on the grounds that:

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[9] *Griggs vs. Duke Power Company* 401 US 424, 91 S.Ct. 849, 28 L.Ed2nd 158. The Griggs rational has been affirmed by the U.S. Supreme Court as recently as 1982 in the case of *Connecticut vs. Teal*, 457 US 440, 102 S.Ct. 2525, 73 L.Ed.2nd 130. All Circuit Courts require that the Defendant prove business necessity. The only reported exception to this rule which could be found was from the Fifth Circuit Court of Appeals which, in 1977, ruled that in certain factual situations, business necessity need not to be proved. *Smith vs. Olin Chemical Corp.* 555F.2nd 1283, 15FEP 290 (1977).

> ...The university lacks the resources to properly insure that minimum standards are maintained in the selection of faculty personnel. 754 F2nd page 640

And that:

> ...Review by disinterested professionals of the institutions from which the applicants have graduated also insures the reliability of the quality of the sponsoring institutions' education programs. 754 F2nd 631, page 640

It is hard to truly envision a major state university defending an illegal employment practice on grounds that it does not have the resources to comply with the law. Congress expanded the law in 1972 specifically to cover universities[10] and the Fifth Circuit Court of Appeals has held that universities must comply with the law. Further, regarding the question of business necessity, Plaintiff should not have the burden of showing that the sponsoring institutions' educational programs are not reliable. Rather, the Defendant should have the burden of showing that graduates of the sponsoring institutions' educational programs do a better job than other librarians, regardless of their credentials. Due to the new burden of proof cast upon the Plaintiff by the Circuit Court, she has been placed in the position of proving that the ALA-MLS schools are not as good as others. This burden of proof is not only impossible, but there is no legal precedent for requiring it.

A rational analysis of the evidence on the issue of

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[10] The Civil Rights Act of 1964 was specifically amended in 1972 to eliminate the exemption for non-religious educational institutions. 42 USCA 2000e-1.

business necessity of the ALA-MLS degree indicates that the entire case of the defendants is based on an assumption. That assumption was openly stated by their expert, Edward G. Holly, Dean of the School of Library Science at the University of North Carolina, an ALA accredited school, who stated:

> ...We have assumed, and I think rightly so, in American colleges and universities that the terminal degree, as defined in each individual field, is self validating for faculty positions. In the case of the library profession, it is a Masters Degree. And increasingly we are requiring additional training beyond that. [T-678]

Dr. Holly apparently applied the "self validating" concept to the ALA-MLS degree. No precedent can be found in the United States Supreme Court or any of the Circuit Courts of Appeal for an assumption of "self validation." Indeed, the entire thrust of civil rights law, to date, has been to abrogate the assumptions that society has imposed on itself and to force public institutions to make their decisions based on the evidence at hand and not on prejudice. History is replete with examples where mankind has moved forward only after "self validating" assumptions have been laid aside. If Christopher Columbus had assumed that the world was flat, you might not be reading this brief. Conversely, if the Fifth Circuit Court of Appeals had not assumed that the ALA-MSL degree was "just better" you also might not be reading this brief.

As a final note on the issue of business necessity, there was not proof by Mississippi State University at all of validation in terms of the Uniform Guidelines on

Employee Selection Procedures 29 CFR Section 1607, *et Seq.* (1978). Heretofore, the Fifth Circuit had cited absence of such proof as a factor weighing against the defendant on business necessity. *Carpenter v. Stephen F. Austin University* 706 F2nd 608, 622 (5th Cir., 1983); *Johnson v. Goodyear Tire and Rubber*, 491 F2nd 1364, 1371 (5th Cir., 1974).

III. *IMPACT OF ALA-MLS REQUIREMENT*

As pointed out by the learned Magistrate,

> To establish a *prima facie* case of discrimination a plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern.[11]

In terms of the Supreme Courts qualitative definition, above, and the quantitative definitions propounded in the Uniform Guidelines on Employee Selection Procedures, the Plaintiff submits her statistical case of adverse impact.[12]

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[11] *Dothard v. Rowlinson*, 433 U.S. 321, 329, 97 S.Ct. 2720, 53 L.Ed. 786, 797 (1977).

[12] One of the central issues in this case is "what makes one a librarian?" Plaintiff contends that a librarian is anyone with the knowledge, skills and ability to do the job of a librarian. It was stipulated that neither the defendants or the plaintiff was aware of any statistical data available on the percentages of male and female graduates from non-ALA accredited library schools. Even if such data were available, it would not be indicative of the total applicant pool because using such data would presuppose that one had to be a graduate from a library school in order to be a librarian. Plaintiff is a graduate of the College of Education at Mississippi State University and hence, would not be included in statistical data on library schools. Professor Sanford stated that since 1970, the Masters Degree program specializing in library science at Mississippi State University had graduated 160 people. 159 are women; one of them is a man. [T-184]

The claim of the Plaintiff that the ALA-MLS minimum educational requirement at Mitchell Memorial Library has a disparate impact on women applicants for professional librarian positions is substantiated primarily through the use of applicant flow data for the years 1971-77 and through applicant flow data for the job in question.

The years 1971-77 reflect a time period during which the ALA-MSL Degree requirement was not in effect by Mitchell Memorial Library and, thus, the applicant pool should be unbiased or unchilled with respect to the ALA-MSL minimum educational requirement.

For the period 1970 through 1977[13], 60 of 111 total female applicants for professional positions at Mitchell Memorial Library possessed the ALA-MLS Degree. For the same time frame, 84 out of a total of 94 male applicants for professional librarian positions possessed the ALA-

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13 Plaintiff's expert statistician, Dr. Marvin J. Karson, compared applicant flow data prior to 1978 with applicant flow data after 1978. [T-283-288] In his analysis, Dr. Karson found:

> ...and, if fact, the statistical analysis that I did was to compare statistically the precentage, 60 to 111, the 54% of the females with the degree in the pre-data versus the 44 to 52 females the with degree, which is about 85%. So that statistically, the difference between 54% in the pre and 85% in the post is significant. And it is significant to a level of approximately less than one in six hundred. Again, highly significant. And, if fact, the only differences that I was able to observe statistically betweent he pre-data and the post-data was in the percentage of the females with the degree. That essentially those without the degree had been screened out by the requirement. And I believe that has been referred to as "a chilling effect." Because now the precentage of females with the degree is very close to the percentage of males with the degree. 89% versus 85% [T286-287]

MLS prerequisite.[14] From this data, it can be seen that 54% of the female applicants had the ALA-MLS for the relevant time period and for the same time period, 89% of the male applicants had the ALA-MLS Degree. It is evident, from this data, that a much smaller percentage of women applicants have the ALA-MLS degree. This effectively demonstrates the discriminatory nature of the ALA-MLS requirement and, together with additional statistical data presented establishes the *prima facie* case of the Plaintiff.

In addition to the applicant flow data, it was stipulated that for the period 1970 until the implementation of the ALA-MLS minimum educational requirement in 1978, 44 persons were hired for professional librarian positions at Mitchell Memorial Library, 36 of whom were women, only 7 of whom (19.4% had the ALA-MLS Degree. *Eight of the 44 hires were men, all of whom (100%)* had the ALA-MLS Degree. Thus, 19.4% of the women hired possessed the ALA-MLS Degree while 100% of the men had it. This data is significant because it means that if the ALA-MLS Degree requirement had been operant during this time frame, 29 women (80.6% of the total women hired) would not have been eligible for employment and would have been screened from consideration by the ALA-MLS requirement whereas *no men would have been affected.* In a different context, 29 of 44 persons hired during this time

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[14] Pre-trial Order, Stipulation of Fact No's. 9 & 10.

Plaintiff's expert, Dr. Marvin J. Karson, testified that Plaintiffs sample was statistically significant at a level of "less than two chances in ten thousand that the difference would be due to chance." [T-282]

frame (66% of all persons hired in this time frame would not have been hired and *all of the non-hires would have been women*. This type of analysis is very illustrative of the tremendous impact of the ALA-MLS requirement has on women applicants for professional positions at Mitchell Memorial Library at Mississippi State University. It is further evidence of disparate impact under the qualitative definition propounded by the U.S. Supreme Court in *Dothard v. Rawlinson, supra.*

Another quantitative measure of adverse impact, as defined by the Uniform Guidelines on Employee Selection Procedures, is the rejection rate[15] for males and females. As we have seen, 51.4% of the female applicants and 88.8% of the male applicants for the years 1971 through 1977 possessed the ALA-MLS Degree. Thus, it can be seen that the rejection rate for female applicants in the relevant time frame would have been 48.6% based on the ALA-MLS requirement whereas the rejection rate for males would have been only 11.2%. This translates to a rejection rate for women that is *4.3 times higher than the rejection rate for men, had the ALA-MLS been the sole minimum educational requirement for the years 1971-1977.*

Finally, it should be noted that all the males employed in professional librarian positions at Mitchell Memorial Library possessed the ALA-MLS Degree and all of the non ALA-MLS professional employees are women[16] and that The College of Veterinary Medicine Library posi-

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[15] Adoption of Questions and Answers to clarify and provide a common interpretation of the Uniform Guidelines on Employee Selection Procedures, Question and Answer No. 20 contained in Federal Register, Volume 44, No. 43, Page 11999.

[16] Pre-trial Order, Stipulations of Fact No's 15 & 16.

tion which was sought by the Plaintiff, is administered by and is an integral part of Mitchell Memorial Library.[17]

Turning to the actual applicants for the profession librarian position in question, both for previous vacancies (1977) and the vacancy the Plaintiff sought to fill in 1980, the evidence establishes that overall, 11 of 16 female applicants (69% and 9 of 9 male applicants[18] (100%) had the ALA-MLS Degree - this, notwithstanding the fact that the degree was published as required and thus potential female applicants not having the degree were chilled or discouraged from applying! Again, disparate impact is self evident.

SUMMARY

In summary, there are numerous reasons in evidence that the ALA-MLS degree was not a business necessity at Mississippi State University. Non ALA-MLS employees were performing as well or better in equivalent jobs. At least twenty percent of academic librarys don't require the ALA-MLS degree for entry level librarian positions. Mississippi State University, in fact, quit requiring the ALA-MLS degree after only having done so for two of its more than one hundred years of existence.[19] In spite of this fact, Defendant's witnesses described Mitchell Memorial Library at Mississippi State University as one of the best in the Southeast. Had not the Fifth Circuit Court of Appeals chosen to apply its maverick "just better" standard, the Defendants would have had to show why the

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[17] Pre-trial Order, Stipulations of Fact No. 5.

[18] Pre-trial Order, Stipulations of Fact No. 63, 64 & 65.

[19] The ALA-MLS was discontinued as a minimum requirement shortly after Plaintiff filed her Cause of Action.

ALA-MLS degree requirement was a business necessity. This they could not have shown under the evidence elicited at the trial.

Regarding business necessity, the Plaintiff demands that she be only required to meet only the burden of proof established by the U.S. Supreme Court, and none other. The departure by the Fifth Circuit Court of Appeals from the accepted and usual course of judicial proceedings by applying its clearly erroneous standard of review in an inappropriate manner, calls for an exercise of power of supervision of the United States Supreme Court.

George McKee
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, George McKee, one of the Attorneys of record for Plaintiff, Glenda Merwine in this cause, do hereby certify that I have, this day mailed, postage prepaid, a true and exact copy of the above and foregoing Petition for Writ of Certiorari and the Appendix, thereto, to the following designated Attorneys opposite or having made appearances in this cause:

William H. Ward and H. Russell Rogers, II
P.O. Box 59
Starkville, MS. 39759

Ed Davis Noble, Jr.
Asst. Atty. Gen.
P.O. Box 220
Jackson, MS. 39205

James S. Whitehead and Mary Hutchings Reed
One First National Plaza
Chicago, Ill. 60603

So CERTIFIED this the _____ day of June, 1985.

_____

George McKee

84-1889

Office-Supreme Court, U.S.
FILED
JUN 4 1985
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT

OF

THE UNITED STATES

GLENDA MERWINE, PLAINTIFF-APPELLANT

VERSUS

BOARD OF TRUSTEES FOR STATE INSTITUTIONS OF HIGHER LEARNING, ET AL, DEFENDANTS-APPELEES

APPENDIX

TO

PETITION FOR WRIT OF CERTIORARI

FROM THE UNITED STATES COURT OF APPPEALS
FOR THE FIFTH CIRCUIT

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MEMORANDUM DECISION
MAGISTRATE CHARLES M. POWERS
for THE U. S. DISTRICT COURT
NORTHERN DISTRICT OF MISS.--------46

Glenda MERWINE, Plaintiff-Appellant,

v.

BOARD OF TRUSTEES FOR STATE INSTITUTIONS OF HIGHER LEARNING, et al., Defendants- Appellees.

No. 84-4036

United States Court of Appeals, Fifth Circuit

March 8, 1985

George McKee, Starkville, Miss., James D. Waide, III, West Point, Miss., for plaintiff-appellant.

William H. Ward, H. Russell Rogers, II, Starkville, Miss., Ed David Noble, Jr., Asst. Atty. Gen., Jackson, Miss., for defendants-appellees.

James S. Whitehead, Mary Hutchings Reed, Chicago, Ill., for amicus curiae.

Appeal from the United States District Court for the Northern District of Mississippi.

Before REAVLEY, TATE, and HILL, Circuit Judges.

ROBERT MADDEN HILL, Circuit Judge:

In her complaint in this case, appellant Glenda Merwine alleges intentional sex discrimination against Mississippi State University (MSU) and members of its hiring committee under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec, 2000(e) et seq., and under 42 U.S.C. Sec. 1983, respectively; she also alleges that the imposition of MSU's published entry-level requirement for a faculty librarian position--a Master of Library Science degree from a school accredited by the American Library Association (ALA-MLS)--had an adverse

impact on women in violation of Title VII. Merwine's complaint arises from her unsuccessful application for a faculty librarian position with the Mitchell Memorial Library at MSU in 1980.

The action was tried before magistrate Charles Powers and a jury with stipulation that any appeal would be taken directly to this Court. 28 U.S.C. Sec. 636(c). The Jury found against appellee George Lewis, director of the Mitchell Memorial Library, and awarded Merwine $5,000 actual damages and $5,000 punitive damages for intentional sex discrimination in violation of Sec.

1983./1 Magistrate Powers took under advisement Merwine's claims against MSU under Title VII based upon the alleged disparate treatment of Merwine and the alleged disparate impact upon women of the ALA-MLS degree requirement. He then rendered a final opinion granting Lewis' motion for judgment notwithstanding the verdict and dismissing all other claims including those claims against MSU

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1. Title 42 U.S.C. 1983, in pertinent part, provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any right, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other properr proceeding for redress.

under Title VII. Merwine duly perfected this appeal.

Merwine challenges the magistrate's grant of judgment notwithstanding the jury's verdict against Lewis. Preliminarily, though, she contends that Lewis' failure to move for a directed verdict at the close of all the evidence precluded the magistrate from addressing Lewis' later motion for judgment notwithstanding the verdict. Finally, she contends that the magistrate's determination that she had failed to establish her Title VII claim of disparate impact was clearly erroneous. For the reasons that follow, we affirm.

I. Facts

In 1978 MSU imposed as a requirement for employment in the

faculty position of librarian the holding of an ALA-MLS degree. In November 1979, MSU advertised in various national library publications a vacancy in the faculty position of branch librarian of the College of Veterinary Medicine. Not having filled the position, MSU readvertised in various national publications in April 1980. In each of the advertisements an ALA-MLS degree constituted the published entry-level educational requirement. The attorney for Merwine conceded at oral argument before this Court that the advertisements for the position Merwine sought did not state that the entry-level requirement was an ALA-MLS or its equivalent. As a result of each of the advertisements, applications were received from across the nation.

Merwine, a thirty-three year old white female, filed her application for the position in May 1980. Thereafter all applications were considered by a search committee composed of one staff and one faculty member from the College of Veterinary Medicine and two female faculty members from Mitchell Memorial Library. Lewis served as chairman of the committee. Between May and August of 1980, the committee reviewed the applications and interviewed two applicants possessing the ALA-MLS degree and one applicant in the process of receiving her ALA-MLS degree. No applicant was interviewed who did not have the ALA-MLS degree. Merwine knew that the ALA-MLS degree was one of the minimum requirements before she applied. Because Merwine

did not possess this degree, her application was not considered further. Subsequently, MSU hired a male applicant who did possess the ALA-MLS degree.

During the period in which applications were considered, Merwine was in the process of receiving a Masters of Education Degree with a major in Secondary Education. She testified, however, that her degree should have been termed a "Master of Education with Major in Secondary Education, Library Science" as planned out with the professor. MSU introduced evidence, however, that it does not offer a Masters in Library Science, accredited or unaccredited, and does not have a graduate degree in library science of any kind. MSU also offered uncontradicted evidence indicating

that eighty to ninety percent of all college and university libraries require the ALA-MLS degree as an entry level requirement for professional-faculty level librarians.

MSU introduced statistics relevant to the disparate impact claim indicating that of the Master of Library Science degrees conferred in this country over the past fifteen years, seventy-nine percent of the ALA-MLS degrees have been conferred upon women, the remaining twenty-one percent upon men. Merwine, however, introduced statistical evidence of the respective percentages of females and males possessing the ALA-MLS degree who applied for professional librarian positions at MSU from 1971 to 1977. Her statistics indicate that 54 percent of the female applicants

possessed the ALA-MLS degree while 89 percent of the male applicants possessed the ALA-MLS degree. Thus, she argues, imposition of the degree requirement in 1978 selects out or preempts a much larger percentage of women than men. These statistics form the basis for Merwine's disparate impact claim.

II. Was Judgment N.O.V. Properly Entertained?

Defendant Lewis failed to move at the close of all evidence for a directed verdict on Merwine's claim of intentional sex discrimination under Sec. 1983. Accordingly, Merwine contends that Fed.R.Civ.P. 50(b) precluded the district court and now precludes this Court from entertaining Lewis' motion for judgment notwithstanding the verdict. Merwine urges strict adherence to form in

complying with Rule 50(b). In Bohrer V. Hanes Corp., 715 F.2d 213 (5th Cir.1983), cert. denied, --- U.S. ---, 104 S.Ct.1284, 79 L.Ed.2d 687 (1984), however, we noted agreement with the Seventh Circuit's pronouncement that although

> [i]t is certainly the better and safer practice to renew the motion for directed verdict at the close of all the evidence,..."[t]he application of Rule 50(b) in any case 'should be examined in the light of the accomplishment of [its] particular purpose[s] as well as in the general context of securing a fair trial for all concerned in the quest for truth.'"

Id. at 217 (quoting Bonner v. Coughlin, 657 F.2d 931, 939 (7thCir.1981)). In Villanueva v. McInnis, 723 F.2d 414, 417 (5th Cir.1984), we recently restated two purposes of Rule 50(b):

> to enable the trial court to re-examine the question of evidentiary insufficiency as a matter of law if the jury returns a verdict contrary to the movant, and to alert the opposing party to the insufficiency before the case is submitted to the jury, thereby affording it an opportunity to cure any defects in proof should the motion have merit.

Lewis argures that the facts of this case are similar to those of Bohrer where we excused defendants' technical noncompliance with Rule 50(b) and that the holding in Bohrer whould apply as well here. We agree.

[1] In Bohrer, defendants moved for directed verdict at the close of plaintiff's evidence and the motion was expressly taken under advisement by the court. After the defendants had introduced evidence damaging to plaintiff, the plaintiff offered no rebuttal evidence; further, the

defendants did not renew the motion at this time. Similarly, Lewis moved for a directed verdict against Merwine at the close of her case./2 While this motion was denied, Merwine was alerted to a possible deficiency in her proof by the court's statement that it would "overrule the motion at this time and allow the proof to be further

---

2. Merwine contends that the motion for directed verdict at the close of plaintiff's proof was addressed solely to the Title VII claims and not to the Sec. 1983 claim against Lewis. We are convinced, however, that motions for directed verdict were made both to the Title VII claims tried by the court and to the Sec. 1983 claim tried by the jury. While Lewis' motion did not specifically refer to the Sec. 1983 claim, he did cite, in furtherance of his motion for directed verdict, the lack of evidence to prove elements of the Sec. 1983 claim. Moreover, when the motions were renewed, the district court stated, "I am not prepared to grant your motions [for directed verdict] ... [a]s to the claims against Drs. Lewis and Miller." Thus, we find no merit to Merwine's contention on this point.

developed by the defendants." In addition, Lewis' motion was renewed toward the end of the jury trial and taken under advisement at that time by the court. Finally, as in Bohrer, after the motion was taken under advisement, Lewis called two defense witnesses and concluded all the evidence; Merwine than failed to offer any rebuttal evidence. On the record here the accomplishment of the purposes of Rule 50(b) have been fully met. See Villanueva, supra. Because we believe that our decision in Bohrer controls this issue, we excuse any arguable noncompliance by Lewis with the requirements of Rule 50(b) which might constitute a bar to the consideration of his motion for judgment notwithstand the verdict.

Our holding is further bolstered by the fact that Merwine did not object or complain when the trial court continued to act on other motions to dismiss that the court had taken under advisement. The court dismissed two defendants after taking the renewed motions to dismiss under advisement, and retained the motions to dismiss from the two remaining defendants, Lewis and Miller. This conduct by the court, at the time the case was submitted to the jury, indicates that it was aware of potential evidentiary problems with Merwine's Sec. 1983 claim. See Jack Cole Co. v. Hudson, 409 F.2d 188, 191 (5th Cir.1969) (citing Roberts v. Pierce, 398 F.2d 954, 956 (5th Cir.1968)). In addition, Merwine's awareness of the pendency of these

motions indicates an awareness of potential problems of evidentiary sufficiency with the Sec. 1983 claim against Lewis. We are convinced no surprise was effected upon Merwine and that the purposes of Rule 50(b) have been served. To require Lewis in this case, to articulate the words of renewal at the close of all the evidence, under the circunstances here, would be "to succumb to a nominalism and a rigid trial scenario as equally at variance as ambush with the spirit of our rules." Bohrer v. Hanes Corp. supra at 217 (quoting Quinn v. Southwest Wood Products, Inc., 597 F.2d 1018, 1025 (5th Cir. 1979)).

III. Intentional Sex Discrimination

[2,3] In Merwine's Sec. 1983 claim against Lewis for intentional

sex discrimination, the jury specifically found in response to special interrogatories that Merwine was qualified for the job at issue, but that she had been denied the job because of favored treatment of Bruce Evans, a male applicant. Evans, who possessed the ALA-MLS degree but was in other respects unqualified, was nevertheless hired. The magistrate entered judgment notwithstanding the verdict on this claim after determining that no reasonable jury could conclude that Merwine was qualified for the position. He concluded, therefore, that Merwine had failed to prove a prima facie case of

sex discrimination under Sec. 1983./3

3. When a Sec. 1983 claim is used as a parallel to a Title VII claim under a given set of facts, the elements required to be established for each claim are deemed the same under both statutes. Rivera v. City of Wichita Falls, 665 F.2d 531, 534n. 4 (5th Cir.1982) (citing Whiting v. Jackson State University, 616 F.2d 116 (5th Cir.1980)). Accordingly, this Circuit has held that the standards enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802m 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973), for establishing a prima facie case in a Title VII employment discrimination action "presents a logical and appealing application in ... 1983 cases." Ramirez v. Sloss, 615 F.2d 163, 168-69 (5th Cir.1980), quoted in Lee v. Conecuh County Board of Education, 634 F.2d 959, 962 (5th Cir.1981). Under McDonnell the criteria for establishing a prima facie case of employment discrimination are: (1) that plaintiff belongs to a protected class; (2) that plaintiff was qualified for a position for which the defendant was seeking paplicants; (3) that despite being qualified, the plaintiff was rejected; and (4) the position remained open and the employer continued to seek applications from persons of plaintiff's qualification. 411 U.S. at 802, 93 S.Ct. at 1824; Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).

The magistrate further determined that even if Merwine could be deemed qualified for the position, no reasonable jury could conclude that Lewis' stated reason for not hiring Merwine -- her lack of an ALA-MLS degree--was pretextual.

Merwine contends that the magistrate's entry of judgment notwithstanding the verdict was error because there was substantial evidence to support the jury's finding that Merwine was qualified for the position. She quotes extensively from the record for the proposition that her educational background was the equivalent of an ALA-MLS degree. Merwine further contends that Lewis' preference for and adherence to the degree requirement, knowing she possessed its equivalent, and his

preference for an otherwise unqualified male applicant, Evans, constituted substantial evidence supporting the jury's implicit finding that his insistance upon the degree requirement was pretextual.

A. Standard of Review

Our recent holding in Lyford v. Schilling, 750 F.2d 1341 (5thCir.1985) (per curiam), recites the standard of review applicable to a Title VII case that, as here, has been tried on the merits. Id. at 1344. In Lyford, we stated

> [t]he three-step analysis of prima facie case, rebuttal, and showing of pretext defined by McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) and Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), is not the proper method of evaluating [a Title VII case that has been fully tried on

the merits]. Williams v. Southwestern Bell Telephone Co., 718 F.2d 715, 717 (5th Cir.1983); see e.g. Wall v. National Railroad Passenger Corp.,718 F.2d 906, 908-09 (9th Cir.1983). As the Supreme Court stated in United States Postal Service Board of Governors v. Aikens, 4670 U.S. 711, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 403 (1983):

> [w]hen the defendant fails to persuade the district court to dismiss the action for lack of a prima facie case, and responds to the plaintiff's proof by offering evidence of the reason for plaintiff's rejection, the fact finder must then decide whether the rejection was discriminatory within the meaning of Title VII. At this stage, the McDonnell-Burdine presumption "drops from the case," and "the factual inquiry proceeds to a new level of specificity." The "factual inquiry" in a Title VII case is "whether the defendant intentionally discriminated against the plaintiff." (citations omitted)

Id.

In another recent decision we stated that "[w]here, as here, the case has been fully tried on the merits, the adequacy of a party's showing at any particular stage of the McDonnell Douglas ritual is of no consequence. We are simply to determine whether the record contains evidence upon the basis of which a reasonable trier of fact could have concluded as the jury did." Elliott v. Group Medical & Surgical Service, 714 F.2d 556, 564 (5th Cir.1983) (footnote omitted). The ultimate issue, that of discrimination vel non, "is to be treated by district and appellate courts in the same manner as any other issue of fact." Williams v. Southwestern Bell Telephone Co. 718 F.2d 715, 718 (5th Cir.1983) (citing Aikens, 103 S.Ct. at 1482).

Accordingly, our review is subject to the same standard as that standard guiding the magistrate's grant of judgment notwithstanding the verdict. In Boeing Co. v. Shipman, 411 F2d. 365 (5th Cir.1969) (en banc), we set forth the standard by which to judge the propriety of a grant of judgment notwithstanding the verdict:

> The Court should consider all of the evidence--not just that evidence which supports the nonmover's case--but in a light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of a motion is proper.

Id. at 374, quoted in Reeves v. General Foods Corp. 682 F.2d 515, 519 (5th cir.1982).

Paying particular attention to the standard of review dictated by

Aikens, we turn to the evidence presented in the course of the trial of this case. In presenting their case below, and in their arguments before this Court, however, the parties have generally followed the McDonnell Douglas three-step format: prima facie case, rebuttal, and showing of pretext. Accordingly, while "it is necessary for us to discuss the elements of that format, our concern is not with the state of the evidence at any of its stages, but rather with the evidence in the case at large." Elliott, supra, at 565 (citing Aikens, supra).

B. Qualification

The magistrate's determination that judgment notwithstanding the verdict was proper centers upon Merwine's failure to establish the

second element (qualification for the position) of her prima facie sex discrimination in hiring case under Title VII. See note 3, supra. The evidence supports the magistrate's conclusion that no reasonable jury could have determined that Merwine was qualified for the position she sought. Merwine asserts that the MSU Promotion and Tenure Policy in effect required not an ALA-MLS degree, but an ALA-MLS degree "or its equivalent". As previously indicated, Merwine's counsel conceded that the ALA-MLS degree only, not the ALA-MLS degree or its equivalent, was the stated minimum educational requirement for the position which Merwine sought. In addition, the notices advertising the position did not include the language "or its equivalent." Further, Merwine

admitted that Lewis, upon her initial inquiry, had informed her of the degree requirement and his strict adherence to the requirement.

[4] Merwine introduced expert witnesses to inform the jury that her qualifications and experience were equivalent to the average qualifications and experience of an ALA-MLS degree holder. This evidence, substantial as it may be, fails to contradict or diminish in any way the simple, uncontested and stipulated fact that Merwine did not possess the published minimum educational requirement-the ALA-MLS degree-for the position of faculty librarian at

MSU./4 The conclusion that Merwine was not qualified for the position is indisputable and a jury verdict to the contrary could not have been reached

4. Our holding does not entirely preclude Merwine from challenging the requirement. She has, more appropriately, asserted a claim of disparate impact under Title VII, alleging a discriminatory practice by virtue of the imposition of the ALA-MLS degree requirement itself. See part IV, infra.

by reasonable persons./5 The magistrate's entry of judgment notwithstanding the verdict on Merwine's Sec. 1983 claim was proper.

C. Was the Qualification a Pretext?

---

5. Our conclusion is further bolstered by virtue of a mistaken assumption made on the part of the jury. The magistrate, referring to a note from the jury, stated to counsel:

> Apparently they misunderstood plaintiff's testimony. They say that "the plaintiff testified that the advertisement in which she found out about the job opening contained the phrase ALA-MLS or equivalent. Were there any documents entered supporting this? In other words, were copies of the advertisement entered into evidence?"
>
> I think, as I recall the testimony, they are wrong in evaluating plaintiff's testimony. (emphasis added).

The magistrate correctly recalled that the advertisements listing the job vacancy did not include the phrase "or equivalent".

Even if we accepted Merwine's contention that evidence supported the jury's finding that she was qualified for the position of branch librarian, thus establishing a prima facie case of sex discrimination, we believe the magistrate was correct in his determination that no reasonable jury could find that Lewis' preference for the ALA-MLS degree was pretextual. The legitimate, nondiscriminatory reason offered by Lewis and MSU for selecting Evans rather than Merwine was the fact that Evans held an ALA-MLS degree and Merwine did not. Merwine, however, has failed to produce evidence from which a reasonable jury could find that Lewis' preference for the ALA-MLS degree was a pretext.

[5] Merwine contends that substantial facts justified the jury's

implicit finding of pretext./6 She asserts that Lewis' stated reason for not considering her was undermined by the fact that Evans, while possessing the ALA-MLS, did not possess other stated requirements./7 The mere fact, however, that Evans did not possess other requirements does not lead to the conclusion or even to a reasonable inference that Lewis' adherence to the ALA-MLS degree requirement in Merwine's case was pretextual.

---

6. The special interrogatories submitted to the jury did not directly address the question of pretext; however, we will assume that the jury's finding--that Merwine was not hired because of preferential treatment of Evans--encompassed the implicit finding that Merwine was not hired because of her sex and not because she lacked the ALA-MLS degree.

7. Evans did not possess the required background in biomedical and natural sciences.

[6] Merwine also contends that because of Lewis' long tenure with MSU and his familiarity with the degree held by Merwine, Lewis must have known that Merwine possessed expertise equivalent to ALA-MLS degree holders. She concludes that the jury could then infer that Lewis' decision not to hire her stemmed from a discriminatory motive and not from her lack of the ALA-MLS degree. No facts presented by Merwine, however, justify the conclusion that Lewis must have known of the relative equivalence of Merwine's degree to the ALA-MLS degree; accordingly, we believe it would be unreasonable for a jury to draw such a conclusion from the record.

Merwine further contends that the jury could draw inferences of pretext

from the fact that Evans was unqualified but nevertheless hired and from the fact that Lewis declined to change his hiring decision even though the grievance committee chairman had requested him to hold Evans' application in abeyance. While the jury might draw an inference of Lewis' favoritism toward Evans, this evidence does little, if anything, to indicate a pretextual adherence to the ALA-MLS degree in order to discriminate against Merwine because of her sex.

[7] The evidence presented by Merwine, with all reasonable inferences drawn in her favor, does not persuade this Court that Lewis' adherence to the ALA-MLS degree requirement was pretextual. All the evidence, viewed favorably to Merwine, points without hesitation to the

opposite conclusion. The uncontradicted evidence establishes that the ALA-MLS degree is a legitimate nondiscriminatory standard for hiring academic librarians. It is a standard widely recognized and utilized by academic and professional employers, including the United States Supreme Court. In addition, as the parties stipulated, at the time Merwine's application was under consideration, six applications were before the hiring committee. Three of the applicants, two females and one male, possessed the required degree and only these three were interviewed for the position. None of the applicants without the degree was even considered. Lewis' uniform application of the degree requirement is indicative that his denial of

Merwine's application for the same reason was not pretextual in nature. More importantly, Evans applied two months after Merwine's application was denied because she lacked the ALA-MLS degree. As a consequence, it strains logic to infer that Lewis' later preferential treatment of Evans, if any, led to or influenced any pretextual adherence to the ALA-MLS degree in earlier refusing to hire Merwine.

We agree with the magistrate's finding that no reasonable jury could find that the preference for such a degree was a pretext in view of the total lack of any credible evidence indicating the preference for such a degree was not a legitimate, nondiscriminatory factor uniformly applied to all applicants.

Accordingly, we hold that the magistrate did not err in granting judgment for Lewis notwithstanding the jury's verdict.

IV. Disparate Impact

Merwine's alternate claim under Title VII is that MSU's imposition of the ALA-MLS degree requirement constituted impermissible sex discrimination because the requirement effected a disparate impact upon women. In support of her claim, Merwine introduced statistical evidence from a pool of applicants for professional librarian positions at MSU from 1971 to 1977. The magistrate rejected these statistics and found that Merwine had failed to prove a prima facie case of disparate impact. Merwine contends that the magistrate's finding was clearly erroneous. Our

review of the magistrate's memorandum decision leads us to conclude that even if Merwine had statistically made out a prima facie case of disparate impact, the ALA-MLS degree requirement was justified as a business necessity./8

[8] Our analysis of the disparate treatment issue reveals that the stumbling block in Merwine's claim was her inability to prove that Lewis' preference for the ALA-MLS degree was pretextual. Similarly, we believe the magistrate's holding that Merwine failed to establish her disparate impact claim impliedly included the finding that the ALA-MLS degree had a manifest relationship to the

8. Accordingly, we decline to address the issues raised by both parties concerning the relevant statistical labor pool to be addressed.

employment position at issue here./9 We decline to hold that this finding was clearly erroneous. Wild v. Lykes

9. In Connecticut v. Teal, 457 U.S. 440, 102 S.Ct. 2525, 73 L.Ed.2d 130 (1982), the Supreme Court stated that

> a plaintiff must show that the facially neutral employment practice had a significantly discriminatory impact. If that showing is made, the employer must then demonstrate that "any given requirement [has] a manifest relationship to the employment in question," in order to avoid a finding of discrimination. Even in such a case, however, the plaintiff may prevail, if he shows that the employer was using the practice as a mere pretext for discrimination.

Id. at 446, 102 S.Ct. at 2531 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). Our aralysis of the disparate treatment issue indicates that the magistrate resolved the question of pretext based on the degree requirement in favor of Lewis and MSU. Accordingly, we need only address the issue of the relationship between hte degree requirement and the employment position at issue.

Bros. S.S. Corp., 734 F.2d 1124, 1125 (5th Cir.1984)./10

Merwine contends that overwhelming evidence supports the conclusion that the ALA-MLS requirement has no manifest relationship to the position of librarian of the College of Veterinary Medicine at MSU. In support of this contention, she directs our attention to the testimony of her expert witnesses indicating that the ALA-MLS degree is not a legitimate minimum educational qualification for professional librarian positions. The expert witnesses premised their

10. A finding is clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525,542,92 L.Ed. 746 (1949).

conclusions primarily upon a stipulation that "nonALA-MLS degree holders at Mitchell Memorial Library of Mississippi State Unviersity perform equally well as ALA-MLS degree holders at Mitchell Memorial Library." Dr. McComas, president of MSU, however, testified that the position at issue is an entry level position. The stipulation concerning current employees at Mitchell Memorial Library does not necessarily lead to the conclusion that at the entry level, nonALA-MLS degree holders would perform equally well as ALA-MLS degree

holder./11 Further, there is evidence in the record that an accreditation standard is particularly appropriate to ensure not only that the applicant has received appropriate instruction and expertise but also that the institution from which the applicant has graduated fulfills recognized, objective academic standards.

Merwine also contends that since MSU prior to 1978 had not utilized the ALA-MLS as a minimum requirement, "there has simply got to be a feasible alternative to such a hard and fast requirement." We uunderstand Merwine

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11. Merwine also refers us to testimony that faculty librarians at MSU who did not possess the ALA-MLS were promoted while some librarians with the required degree were not. Similarly, this testimony alone does not necessarily indicate that a business necessity does not exist for imposing the degree as a minimum educational requirement for entry-level positions.

to argue from this fact that even though the ALA-MLS degree might bear some relationship to the position of librarian of the College of Veterinary Medicine, because a feasible alternative must exist, the degree requirement can not bear a "manifest" relationship to the employment in question. See Teal, supra, 457 U. S. at 446, 102 S.Ct. at 2530-2531. Merwine fails, however, to point to the feasible alternative she suggests must exist. In addition, the mere fact that MSU had prior to 1978 been operating under a different procedure--ostensibly a less objective one--does not preclude the imposition nor necessity of an educational entry-level requirement to meet the needs of a growing and changing university system.

The evidence Merwine offers to support her contention that the ALA-MLS degree can not be justified as a business necessity does not lead us to conclude "with a definite and firm conviction that a mistake has been committed." United States Gypsum Co., supra. Rather, the evidence we have adduced from the record leads us to believe that the magistrate's finding that Merwine failed to prove her disparate impact claim was correct.

As the magistrate found during the course of his analysis of the disparate treatment issue, "the evidence clearly establishes that the degree is a standard widely recognized by academic and professional employers...." In addition, uncontested evidence indicates that approximately eighty percent of

college and university libraries require that applicants for library faculty positions possess the ALA-MLS degree. Further, there was testimony that on average the ALA accredited MLS degree holder, as opposed to nonaccredited degree holders, exhibits a noted superiority in reliability and dependability to the hiring library. Accordingly, sufficient evidence supports the magistrate's determination that a manifest relationship exists between the degree requirement and the position of librarian of the College of Veterinary Medicine at MSU.

The degree requirement was imposed in 1978 to upgrade the quality of potential applicants and to ensure that future applicants possess the minimum, desired qualifications.

Merwine asserts, however, that a minimum degree requirement will create an artifical barrier to employment for those few who might perform better than an applicant with an ALA-MLS. Thus she contends, the degree requirement may potentially downgrade the MSU library system. Notwithstanding the lack of evidentiary support for Merwine's contention, we believe that the magistrate as trier of fact is the proper party to resolve these issues; and, as we believe that his findings were not clearly erroneous, we conclude that no error was committed.

The ALA-MLS degree requirement is further justified, as a business necessity, in light of evidence indicating that an otherwise subjective standard for entry level

applicants would impose an unreasonable burden on MSU. Merwine's expert witness testified that if he were running a university library with only fulltime university people for volunteer search committee duties, he would have to weigh the choices between subjective requirements and an objective degree requirement. Dr. McComas also testified that the university lacks the resources to properly ensure that minimum standards are maintained in the selection of faculty personnel. He further testified that a review by disinterested professionals of the institutions from which applicants have graduated also ensures the reliability of the quality of the sponsoring institutions' educational programs.

While administrative convenience alone does not validate MSU's imposition of the degree requirement, we believe that MSU's preference for an objective degree requirement that is widely recognized by academic and professional employers and that is required by approximately eighty percent of college and university libraries is supported as a valid business necessity. Our review of the record indicates that the magistrate was not clearly erroneous in concluding that the ALA-MLS degree requirement had a manifest relationship to the position Merwine sought.

For the foregoing reasons, the judgment rendered below is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF MISSISSIPPI

EASTERN DIVISION

GLENDA MERWINE,

Plaintiff

V.
NO. EC 81-154-WK-P

BOARD OF TRUSTEES FOR STATE INSTITUTIONS OF HIGHER LEARNING, ET AL,

Defendants

MEMORANDUM DECISION

This action arises from the unsuccessful attempt by plaintiff Glenda Merwine to obtain the position of branch librarian for the College of Veterinary Medicine at Mississippi State University (MSU) in 1980. Although plaintiff raised multiple claims against multiple defendants, the only claims before the court for

disposition at this juncture are plaintiff's claim under 42 U.S.C. Sec. 1983 of intentional discrimination against her on the basis of her sex by defendant George Lewis, director of the Mitchell Memorial Library at MSU, in the hiring decision at issue, plaintiff's counterpart claim against MSU under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e, et seq., and plaintiff's Title VII claim against MSU based upon the alleged disparate impact upon women of the requirement of a specific degree for the job in issue, viz., a Master of Library Science from a school accredited by the American Library Association (ALA-MLS degree).

Plaintiff's 1983 claim against Lewis was tried to a jury, which returned a special verdict for

plaintiff awarding $5,000.00 in actual damages, and $5,000.00 in punitive damages. In the special verdict, the jury specifically found that plaintiff was qualified for the job at issue, but that she had been denied the job because of favored treatment of a male applicant who was unqualified but nevertheless hired. This claim is before the court on motion of defendant Lewis for judgment notwithstanding the verdict. Since the elements of plaintiff's 1983 claim against Lewis are identical to her parallet Title VII claim against MSU, Rivera v. City of Wichita Falls, 665 F.2d 531, 534 n.4 (5th Cir. 1982), disposition of plaintiff's 1983 claim is dispositive of her parallel Title VII claim. E.g., Dairy Queen, Inc. v. Wood, 369 U.S. 469, 8 L.Ed.2d 44

(1962); Caputo v. U. S. Lines Co., 311 F.2d 413 (2nd Cir.) cert. denied, 374 U.S. 833, 10 L.Ed.2d 1055 (1963)./1

Consideration of Lewis' motion for judgment notwithstanding the verdict is controlled by the standard established by the Fifth Circuit in Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969):

> On motions for ...judgment notwithstanding the verdict the Court should consider all the evidence -- not just that evidence which supports the non-mover's case--but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court

1. Similarly, the finding of the jury for defendants Lewis and Miller on plaintiff's 1983 claim of sex discrimination in that she was denied the job in question because she was the wife of a veterinary medicine student is dispositive of plaintiff's parallel Title VII claim against MSU.

> believes that reasonable men could not arrive at a contrary verdict, granting of the motion is proper.

Id. at 374. After careful consideration under the above-quoted standard of all the evidence introduced in this cause, the court is of the opinion that reasonable men could not, under the applicable law, arrive at a verdict other than for Lewis, and that the motion accordingly is well taken.

To prove a prima facie sex discrimination in hiring case under Title VII, or a parallel claim under Sec. 1983, a plaintiff must show (1) that she is a woman; (2) that she applied and was qualified for the job for which the employer was seeking applications; (3) that she was rejected; and (4) that after her rejection the employer continued to

seek applications from persons of plaintiff's qualifications. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 36 L.Ed, 2d 668, 677 (1973). Here, it is undisputed, and is in fact stipulated, that "the American Library Association accredited Master of Library Science degree was the minimum educational requirement for the position of branch librarian of the College of Veterinary Medicine at Mississippi State University, the position sought by the plaintiff." It is further stipulated that the notices advertising such position specified the ALA-MLS as the educational requirement for the job, and plaintiff's own testimony is that Lewis informed her from her initial inquiry about the job that if he made the hiring decision, he was going to

adhere to the ALA-MLS requirement. Plaintiff further testified that one of the members of the Search Committee considering applications for the position informed her that when plaintiff's application was brought up before the Committee, Lewis was adamant about the ALA-MLS requirement. It is further stipulated that of the six applications for the job before the Search Committee at the time the hiring decision was made, three applicants, two female and one male, had ALA-MLS degrees, and three did not, and that only those with the ALA-MLS degrees were interviewed for the job. Also, it is stipulated that plaintiff's application was submitted in May 1980, was brought before the Search Committee at that time, and was not considered after it was determined

that she did not have an ALA-MLS degree. Additionally, it is stipulated that the male applicant who obtained the job held an ALA-MLS degree, and did not apply until July 1980 -- two months after the Committee decided not to consider plaintiff's application because of her lack of an ALA-MLS.

In short, the stipulations and other evidence establish without any contradiction that the ALA-MLS was the minimum educational requirement for the job, and that plaintiff did not hold such degree. The conclusion that plaintiff was not fully qualified for the job thus is inescapable, Hernandez-Cruz v. Fordham University, 521 F. Supp. 1059, 1070-71 (S.D. N.Y. 1981), and the verdict of the jury to the contrary could not have been reached by reasonable men. While

plaintiff could be, and according to the evidence, probably should be, considered subjectively qualified for the job, it is undisputed that she did not meet the established objective minimum educational requirement for the job, and she therefore could not establish a prima facie case of sex discrimination.

Even if plaintiff is assumed to be subjectively qualified for the position, and that she thereby established a prima facie case, the verdict of the jury nevertheless must be set aside. Once a plaintiff establishes a prima facie case, the burden shifts to the defendant to present evidence sufficient to raise a genuine issue of fact that plaintiff was not hired, or that someone else was hired, for a legitimate,

nondiscriminatory reason, which legitimate, nondiscriminatory reason may thereafter be proved by the plaintiff to be a mere pretext. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 67 L.Ed.2d 207 (1981). Here, the reason offered for preferring the person hired to plaintiff was the fact that he held an ALA-MLS degree. Without detailing the evidence concerning the desirability vel non of such a degree, the evidence clearly establishes that the degree is a standard widely recognized by academic and professional employers, including the United States Supreme Court. No reasonable jury could conclude otherwise from the evidence received, and no reasonable jury could find that the preference for such a degree was a pretext in view of the

above-enumerated facts established by the stipulations and other evidence, and the total lack of any credible evidence indicating the preference for such a degree was not a legitimate factor uniformly applied to all applicants.

For the foregoing reasons, the court finds that the motion of defendant Lewis for judgment notwithstanding the verdict on plaintiff's Sec.1983 claim of sex discrimination against him is well taken and should be granted, and that judgment should be entered for defendants on plaintiff's parallel Title VII claim for the same reasons.

Plaintiff's alternative claim under Title VII is that she was a victim of sex discrimination in the hiring decision in question because of

the alleged disparate impact upon women of the ALA-MLS requirement./2 Incorporated herein pursuant to Rule 52(a), F.R. Civ.P., are findings of fact and conclusions of law regarding same.

Plaintiff attempted to establish a prima facie case of discriminatory impact of the ALA-MLS requirement by a statistical analysis of applicant flow data for professional librarian positions at MSU using the "four-fifth's" test implicitly approved by the Supreme Court in Connecticut v. Teal, ___ U. S. ___, 73 L.Ed.2d 130 (1982), and showing the results of

2. It is stipulated that the ALA-MLS is no longer a minimum requirement for professional librarian positions at MSU. It was further stipulated at trial that plaintiff has no loss of income because of failure to obtain the job.

such to be statistically significant by a chi-square analysis.

> Although a prima facie case of racial discrimination may be established by nothing more than valid statistical evidence of a significant discriminatory impact of defendant's practices ...the usefulness of such statistics varies with the surrounding facts and circumstances, which either support or undermine the inference of discrimination offered by the statistics.

Williams v. Tallahassee Motors, Inc., 607 F.2d 689, 691 (5th Cir. 1968). In other words, "while statistics are an appropriate method of proving a prima facie case of racial discrimination, such statistics must be relevant, material and meaningful, and not segmented and particularized and fashioned to obtain a desired conclusion." EEOC v. Datapoint Corp., 570 F.2d 1264, 1269 (5th Cir. 1978). For the reasons which follow, the

court finds that plaintiff's statistical analysis is not probative, and is insufficient to establish a prima facie case of disparate impact of the ALA-MLS requirement on women.

Defendant James D. McComas, President of MSU, testified that MSU recruits nationwide for faculty positions, as did Emmett T. Kohler, Director of Institutional Research at MSU. The position for which plaintiff applied was advertised in several nationwide publications of special interest to professional librarians. Plaintiff's expert witness, Dr. Edward Holly, Dean of the School of Library Science at the University of North Carolina for 11-1/2 years, testified that the geographic market for faculty-level librarian positions is nationwide. His testimony is borne out

by the stipulated residences of the original applicants for the College of Veterinary Medicine branch librarian position, and the same information for the applicants for the vacancy at issue. The stipulations establish that applications were received from residents of Georgia, Illinois, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, Mississippi, New York, Ohio, Oregon, Texas, Virginia, Canada, and India. The court accordingly finds that the relevant geographic labor market for potential applicants for faculty-level librarian positions such as that at issue is at least the continental United States. See generally, Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1370-71 (5th Cir. 1974).

The evidence further establishes, and the court so finds, that in the past 10 to 12 years, approximately 50,000 ALA-MLS degrees have been awarded nationwide, and that approximately 80% of these degrees have been awarded to women.

> [T]o establish a prima facie case of discrimination a plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern.

Dothard v. Rowlinson, 433 U.S. 321, 329, 53 L.Ed 786, 797 (1977). In view of the above figures, it flies in the face of logic and common sense to say that an ALA-MLS requirement "selects applicants for hire" in a manner discriminatory to women.

Because of the great predominance of women ALA-MLS holders in the relevant job market, and the

relatively large number of ALA-MLS degree holders as compared to the sample of applicants relied upon by plaintiff in her statistical analysis -- approximately 200 applicants over a seven-year period -- the court finds the conclusion of disparate impact reached by plaintiff's statistical analysis worthy of little consideration. This is not a case like Connecticut v. Teal, supra, where the impact of a challenged requirement can be determined only by reference to those applying for the position, i.e., where the only manner in which one can achieve the contested requirement is through the application process. The evidence, including the testimony of plaintiff's expert Bemis, also establishes that the applicant data relied upon by plaintiff may not be

representative because of such factors as the salary levels at MSU for the subject years, and the undefined nature of the positions for which the applications were made, other than that they were "professional librarian positions". The Supreme Court has recognized that "[t]he application process might not adequately reflect the actual potential applicant pool ..." Dothard v. Rawlinson, supra, 433 U.S. at 330, 53 L.Ed.2d at 798.

Additionally, the applicant flow data relied upon by plaintiff, when properly limited to plaintiff's individual claim, does not violate the four-fifth's rule. The data relied upon by plaintiff, which is stipulated, is that from 1971-77, there were a total of 111 female applicants for professional librarian

positions at MSU, 60 of whom had an ALA-MLS degree, and 51 of whom did not. The uncontradicted evidence, however, is that of the 51 non-ALA-MLS holders, 35 did not have master's degrees at all. Plaintiff does have a master's degree, and does not complain of a general master's degree requirement for the job. She has no standing to complain about a simple master's requirement, since she cannot suffer any adverse consequences because of a master's requirement, but only from the specific ALA-MLS requirement. See Payne v. Travenol Laboratories, Inc., 565 F.2d 895, 898-99 (5th Cir.) cert. denied, 439 U.S. 835, 58 L.Ed.2d 131 (1978).

When the non-master's female applicants are deleted from the applicant data, there is no violation

of the four-fifth's rule. In the court's opinion, lumping all female applicants together, regardless of their dissimilar qualifications, is fashioning statistics to obtain a desired conclusion, viz., that the ALA-MLS requirement discriminates against women. Such analysis assumes that all women applicants, whatever their credentials, are members of the qualified labor pool from which applicants are sought. Such an assumption is illogical and unwarranted when dealing with professional positions.

The court accordingly concludes that plaintiff has failed to establish a prima facie case of discrimination in hiring on the basis of sex in violation of Title VII because of utilization of the ALA-MLS requirement

by MSU for the position of branch librarian at the College of Veterinary Medicine in 1980.

In summary, the court finds that defendant Lewis' motion for judgment notwithstanding the verdict is well taken, and that defendants are entitled to judgment on plaintiff's Title VII claims. Judgment shall be entered accordingly.

This, 29th day of December, 1983.

Charles M. Powers

UNITED STATES MAGISTRATE

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF MISSISSIPPI

EASTERN DIVISION

GLENDA MERWINE,

Plaintiff

V.
NO. EC 81-154-WK-P

BOARD OF TRUSTEES FOR STATE INSTITUTIONS OF HIGHER LEARNING, ET AL,

Defendants

ORDER OF JUDGMENT

Pursuant to the Memorandum Decision this date entered herein, it is Ordered and Adjudged that the motion of defendant Lewis for judgment notwithstanding the verdict is hereby granted, that plaintiff have of and take from defendants nothing, and that plaintiff's complaint is hereby dismissed.

SO ORDERED, this 29th day of December, 1983.

Charles M. Powers

UNITED STATES MAGISTRATE

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NO. 84-1889

In the Supreme Court of the United States

OCTOBER TERM, 1985

GLENDA MERWINE

Petitioner

VERSUS

BOARD OF TRUSTEES FOR STATE INSTITUTIONS OF HIGHER LEARNING, ET AL,

Respondents

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

NUMBER 84-4036

Decided March 8, 1985

Reported in 754 F.2d 631

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IN THE SUPREME COURT
OF
THE UNITED STATES

OCTOBER TERM, 1985
NO. 84-1889

GLENDA MERWINE,

Petitioner

VERSUS

BOARD OF TRUSTEES FOR STATE INSTITUTIONS OF HIGHER LEARNING, ET AL

Respondents

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinions of the lower courts are adequately presented in the text of the petition.[1]

JURISDICTION

The judgment of the Court of Appeals was entered March 8, 1985. Jurisdiction of this Court is invoked under 28 U.S.C. §2101(c).

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[1] The American Library Association received permission but elected not to file amicus curiae briefs in this cause.

QUESTIONS PRESENTED

I.

Whether the District Court and Court of Appeals findings and opinions on disparate impact are in conflict with this Court or another court of appeals or constitutes a radical departure from accepted judicial proceedings.

II.

Whether the District Court and Court of Appeals consideration of the merits have so far departed from the accepted and usual judicial proceedings as to call for an exercise of this Court's power of supervision.

III.

Whether the District Court and Court of Appeals findings and opinions on manifest job relatedness are in conflict with this Court or another court of appeals or constitutes a radical departure from accepted judicial proceedings.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Statutes involved in the case are adequately presented in the petition.

STATEMENT OF THE CASE

In 1978 Mississippi State University, upon recommendation of the Library faculty, adopted a policy that faculty librarians being appointed should have appropriate terminal professional degree, e.g. a Master's Degree from a Library School accredited by the American Library Association.

In November 1979, the position in question was advertised in various national library publications. The position in question was readvertised in various national publications in April 1980. Published job vacancy notices contained an entry level requirement of a Master's degree in Library Science from a library school accredited by the American Library Association. Applications were received from all parts of the nation and applicants were considered by a Search Committee of staff and faculty from the College of Veterinary Medicine and Mitchell Memorial Library. All applicants possessing the accredited degree were interviewed. No applicant without the accredited degree was interviewed. The person selected held the required accredited degree.

Plaintiff holds a Master's Degree in Education with major in Secondary Education. Plaintiff does not challenge the requirement of a Master's degree or any other requirements other than ALA accreditation.[2]

Plaintiff filed suit charging inter alia that the facially neutral accredited degree requirement had an adverse impact on women applicants.

The District Court found that the Plaintiff had failed to make a prima facie case of disparate impact against the University under Title VII of the Civil Rights Act of 1964.[3]

The District Court found that the Plaintiff attempted to establish a prima facie case of disparate impact by statistical analysis measured by *Connecticut v. Teal*, 457 US 440, 102 S. Ct. 2525 (1984), 73 L. Ed. 2d 130 (1972). The evidence did not reflect a statistical analysis which was relevant, material and meaningful, but was segmented, particularized and fashioned to obtain a desired conclusion. The District Court found that the relevant geographic labor market of potential applicants for the position was at least the continental United States, that in the past ten to twelve years approximately 50,000 accredited Master of Library Science degrees had been awared and that approximately eighty percent of these degrees had been awarded to women.[4]

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[2] T-253

[3] Appendix 60

[4] Appendix 58-66

The District Court found that while no prima facie case had been established, the Defendant had clearly established that the degree is a standard widely recognized by academic and professional employers. The District found that the evidence and stipulations precluded a finding that the requirement was a pretext.[5]

The Court of Appeals affirmed the Magistrate's holding that Plaintiff failed to establish a disparate impact claim and affirmed the finding that the accredited degree had a manifest relationship to the employment position.[6]

The Court of Appeals further affirmed that a manifest relationship to the employment in question had been clearly proved and that the accredited degree requirement is justified as a business necessity by the record.[7]

ARGUMENT

I.

DISPARATE IMPACT

With applications sought and reviewed from all parts of the United States, and with women holding approximately eighty percent of the required entry level degrees, Plaintiff attempted to fashion applicant

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[5] Appendix 56-57

[6] *Merwine vs. Board of Trustees*, 754 F.2d 631, 639, 640, (5th Cir. 1985)

[7] Merwine (supra) 754 F.2d 631, 641

flow statistics for the period 1970 to 1977. During the period selected by the Plaintiff, no graduate degree, accredited or unaccredited, was required.

The District Court found from stipulations and evidence that the relevant geographic labor market for potential applicants is at least the continental United States.[8] The District Court further found that the evidence establishes that in the past ten to twelve years approximately 50,000 ALA accredited MLS Degrees have been awarded nationwide, that approximately eighty percent of these degrees have been awarded to women.[9]

Plaintiff's thrust at establishing her prima facie case of disparate impact consisted of a statistical analysis of applicant flow data during a prior decade, relating to undefined positions, and consisting of approximately two hundred applicants over a seven year period. The applicant flow data included thirty-five women who held neither Plaintiff's qualifications nor the required qualifications.[10]

The District Court found that Plaintiff's statistical analysis was not probative, that the requirement did not select applicants for hire in a manner discriminatory to women, there being a great predominance of women ALA-MLS degree holders in the relevant job market. This case is unlike *Connecticut v. Teal* dealing with promotion where

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[8] Appendix 61

[9] Appendix 62

[10] Appendix 65

impact of the challenge requirement can be determined only by reference to those applying for promotion.[11]

The Court of Appeals noted that the Magistrate rejected Plaintiff's statistical analysis and found that the Plaintiff had failed to prove a prima facie case of disparate impact[12], holding that the District Court's finding was not clearly erroneous. The Court of Appeals further held that "... the evidence we adduced from the record leads us to believe that the Magistrate's finding that Merwine failed to prove her disparate impact claims was correct."[13]

On the issue of validation in terms of the Uniform Guidelines on Employee Selection Procedures, the District Court found that Plaintiff's statistical analysis was not probative and was insufficient to establish the prima facie case of disparate impact.[14] The District Court further found that when the applicant flow data relied on by the Plaintiff was properly limited to Plaintiff's individual claim it does not violate the four-fifths rule after eliminating women applicants who had neither Plaintiff's degree nor the required degree.[15] When the non-masters female applicants are deleted from the applicant data there is no violation of the four-fifths rule.[16]

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[11] Appenix 63

[12] Merwine (supra) 754 F.2d 631, 639

[13] Merwine (supra) 754 F.2d 631, 640

[14] Appendix 60

[15] *Payne v. Travenol Laboratories, Inc.*, 565, F.2d 895, 898-99, (5th Cir.) cert. denied, 439 U.S. 835, 58 L.Ed. 2d 131 (1978)

[16] Appendix 64, 65, 66

II.

STANDARD OF REVIEW

The standard of review applied in this case by the District Court and the Court of Appeals complies with the well settled standards laid down by the United States Court of Appeals for the Fifth Circuit for review of Title VII cases that have been fully tried on the merits. The three-step analysis of prima facie case, rebuttal and showing of pretext, does not remove Title VII cases from the standard of review applicable to all civil litigation. Where the case has been fully tried on the merits, the adequacy of a party's showing at any particular stage is of no particular consequence.[17] The ultimate issue, that of discrimination vel non, is to be treated by the District and Appellate Courts in the same manner as any other issue of fact.

In *U.S. Postal Service Board of Governors v. Aikens* 460 US 711, 716, 75 L.Ed. 2d 403, 411 (1983) the standard was stated:

> "But none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact. Nor should they make their inquiry more difficult by applying legal rules which were devised to govern 'the basic allocations of the burdens and order of presentation of proof.' (citations ommitted).

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[17] *Williams v. Southwestern Bell Telephone Co.*, 718 F.2d 715, 717, (5th Cir. 1983)

The United States Court of Appeals for the Fifth Circuit has defined the proper standard of review in Title VII cases as the same standard guiding trial courts and appellate courts in other civil litigation, without necessity of discussing the elements of the three-step format or the state of the evidence at any of the stages of trial.[18]

After the Defendant has offered evidence of manifest job relatedness of the academic entry level requirement, Plaintiff had every opportunity to offer such proof as might be available to show that the requirement was a pretext. Plaintiff has not been put in a position of proving the absence of job relatedness but was properly under a burden of showing pretext if evidence of pretext was available. The District Court and the Court of Appeals exercised the proper standard of review in considering the ultimate question of discrimination vel non from the entire record.

III.

MAINFEST RELATIONSHIP OF THE REQUIREMENT

While the District Court and the Court of Appeals concur that the evidence does not support a finding of disparate impact, Plaintiff contends that the District Court and the Court of Appeals erred in finding job relatedness or business necessity.

In cases where a prima facie case of disparate impact is reached the burden shifting to the Defendant is well settled. Variously termed "manifest

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[18] *Reeves v. General Foods Corporation*, 682 F. 2d 515, 519, (5th Cir. 1982); *Elliott v. Group Medical and Surgical Service*, 714 F.2d, 556, 564, (5th Cir. 1983); *Williams*, supra; *Lyford v. Schilling* 750 F.2d 1341, (5th Cir. 1985).

relationship", "job relatedness" or "business necessity", the Courts have uniformally interpreted the requirement to be that only tests that were *job related* would be permissible despite their disparate impact. In *Connecticut v. Teal,* 457 U.S. 440, 452, 102 S. Ct. 2525, 2533, 73 L.Ed.2d 130, 140, (1982), the requirement is stated:

> "...we concluded that Congress in adding §703(h) intended only to make clear that tests that were *job related* would be permissible despite their disparate impact." (citations ommitted)

Footnote 8 of the Petition (Pet. 12) refers to a faculty member's testimony relating to four ladies employed in prior years without the ALA accredited degree at the time of their employment, who received promotions in the library. Each of the ladies had a decade or more experience in the library[19] and had been hired at a time where there was no graduate degree requirement. Two of the ladies referred to served on the faculty committee recommending adoption of the ALA-MLS degree policy in 1978 to the library faculty.[20]

The Court of Appeals found from the evidence in the record that the accreditation standard is particularly appropriate to insure not only that the applicant has received appropriate instruction and expertise but also that the institution from which the applicant has graduated fulfills recognized, objective academic standards[21]; that a review of applicants by

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[19] T. 565, T. 630

[20] T. 568, T. 631, where one of the ladies referred to chaired the committee.

[21] Merwine, supra, 754 F.2d 639-640

disinterested professionals of the institution from which applicants have graduated also insures the reliability and quality of the sponsoring institutions educational programs.[22]

While the record of evidence is replete with expert testimony particularizing selection problems and uncertainities in the absence of academic accreditation, it is not encumbent upon the Court of Appeals as a standard of review, to detail the evidence before it or to articulate beyond its findings of ultimate facts. Furthermore, the Court of Appeals' opinion has no effect on Plaintiff's burden of proof although the Plaintiff was at liberty to offer evidence in rebuttal of Defendant's proof of job relatedness or proof that it was pretexural.

The Court of Appeals properly addressed Plaintiff's contention that non ALA-MLS degree holders presently employed at Mitchell Memorial Library perform equally well with ALS-MLS degree holders during 1970 to 1977. The opinion reasoned correctly that the position at issue is an entry level position and stipulations as to previously employed employees does not necessarily lead to a conclusion that a standard, objective academic requirement would not better meet the needs of a librarian for the College of Veterinary Medicine.[23]

Notwithstanding the fact that eighty percent of the required accredited degrees are held by women, Plaintiff has asserted before the District Court and the Court of Appeals that the requirement will create an artificial bearer to employment for those few who might perform better than some applicant with an

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[22] Merwine, supra, 754 F.2d 640

[23] Merwine, supra, 754 F.2d at 639, 640

accredited degree. One of the factors referred to in the Court of Appeals decision was the fact that the University had only fulltime University people for volunteer Search Committee duties. The opinion referred to testimony, including Plaintiff's expert witness, that under such circumstances validation of subjective criteria would be questionable.[24] The opinion was careful to hold that convenience alone does not validate the University's imposition of the degree requirement, that the University's preference for an objective degree requirement is widely recognized by academic and professional employers and is a recognized standard among college and university libraries as a business necessity.[25]

No inference can be drawn from the District Court's opinion or the Court of Appeals' opinion that a new burden of proof is cast upon the Plaintiff by the adoption of a published, objective and related entry level academic requirement for professionals.

Neither the District Court nor the Court of Appeals hints that preferential treatment toward universities or the imposition of any different standard and would be applicable by comparison to other professions or business. While the objective requirements may vary between professional faculty and other non-academic professions, there is no contention by the courts or the defendants that the requirements should vary in principle.

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[24] Merwine, supra, 754 F.2d at 640

[25] Merwine, supra, 754 F.2d at 640-641

CONCLUSION

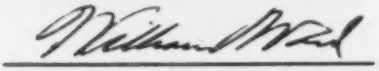
Plaintiff's disparate impact claim is based upon her charge that the facially neutral entry level accrediation requirement had an adverse effect on women whose applications were sought and received from throughout the United States. Approximately eighty percent of the accredited degrees are held by women. Any "headwind" effect of the requirement would logically impact against men.

As a result, Plaintiff attempted to fashion a small, segmented applicant flow data between 1970 and 1977 when no graduate degree requirements of any kind was in effect. By including applicants with no graduate degree Plaintiff attempted to show a violation of the "four-fifths" rule under the Uniform Guidelines on Employee Selection Procedures. As the District Court held and the Court of Appeals affirmed, the statistics were not relevant or meaningful. When the 1970-1977 women applicants with plaintiff's qualifications were compared to the required qualification, the four-fifths rule was not violated according to Plaintiff's own expert and other expert witnesses.

A manifest relationship of the accrediatation requirement to the faculty position is evident from the District Court and Court of Appeals opinion and is supported by the record almost without issue. Pretext is not an issue by reason of a lack of evidence of pretext and the fact that Plaintiff's application came substantially after the accreditation requirement was implemented.

Finally, this case is void of any novel, conflicting or unsettled legal issues. Both the District Court and the Court of Appeals has carefully followed well settled substantive law and standards of review.

Respectfully submitted,



William Ward

CERTIFICATE OF SERVICE

I, William Ward, Attorney for Respondents, do hereby certify that I have this day mailed postage fully prepaid, a copy of Brief of the Respondents in Opposition to Petition for Writ of Certiorari to the following:

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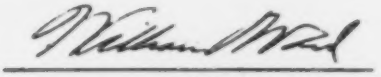
This 1st day of July, 1985.



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